DOROTHY H. MARSH

IBLA 71-140 Decided January 22, 1973

Appeal from decision (N-4953) of Bureau of Land Management Land Office, Reno, Nevada, denying application for life estate under the Mining Claims Occupancy Act.

Affirmed as modified.

Mining Occupancy Act: Generally--Patents of Public Lands: Generally--Patents of Public Lands: Effect

> The Department has no further jurisdiction over land which has been patented and an application under the Mining Claims Occupancy Act as amended, 30 U.S.C. §§ 701-709 (1970), for such land must be rejected.

Patents of Public Lands: Generally--Patents of Public Lands: Suits to Cancel

> The Department will not ordinarily recommend that the Attorney General start suit to cancel a patent unless (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Goverment is under obligation has suffered by issue of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved. Where such considerations are present it is proper for this Board to recommend to the Solicitor such referral to the Attorney General.

APPEARANCES: William H. McNeil, Esq., Washoe County Legal Services, Reno, Nevada, for the appellant.

OPINION BY MR. FISHMAN

Dorothy H. Marsh has appealed from a decision, dated November 25, 1970, rendered by the Land Office at Reno, Nevada, which rejected her application for a life estate under the Mining Claims Occupancy Act, as amended, 30 U.S.C. §§ 701-709 (1970).

The basis of the rejection was that the land in issue had been patented on March 30, 1970, to Helen M. Birch and Fred H. Howe under patent No. 27-70-0090, pursuant to the same Act.

Appellant has submitted evidence tending to show that she and her husband occupied and purchased a house under a conditional sale contract on the land from June 9, 1952. The appellant asserts that the patent issued "* * * included land that was not at any time after June 9, 1952, either occupied or in any way utilized by them [the patentees] as a place of residence as required by the provisions of the Mining Claims Occupancy Act for the reason that affiant [the appellant] has maintained her dwelling and residence on part of said parcel continuously since June 9, 1952."

The Land Office decision was clearly correct in holding that where land has been patented, the Department has no jurisdiction over such land. Germania Iron Company v. United States, 165 U.S. 379 (1897); Everett Elvin Tibbets, 61 I.D. 397 (1954). An application under the Mining Claims Occupancy Act, as amended, 30 U.S.C. §§ 701-709 (1970) embracing such land must therefore be rejected. Pollyanna Rice and Robert F. Henderson, A-30386 (May 12, 1965). Appellant seeks to have the patent canceled.

The discussion in John R. Bowen, A-28326 (July 11, 1960), is pertinent to this issue:

The Acting Director's decision from which the instant appeal is taken affirmed the manager's rejection of Bowen's application on the ground that this Department has no jurisdiction over patented land, citing Germania Iron Company v. United States, 165 U.S. 379 (1897). The decision pointed out that the inadvertent failure of the land office to consider and take final action on Bowen's application before offering the land for sale did not infringe on any legal rights of the appellant, as the filing of a homestead application gives no right to the land to an applicant (Everett Elvin Tibbets, 61 I.D. 397 (1954)). Consequently, the failure of the land office to consider Bowen's homestead application before classifying the land pursuant to a subsequently filed public sale application, though unfortunate, was not such a mistake as would justify a request that proceedings be instituted to set aside the patent (Everett Elvin Tibbets, supra). In the Tibbets case involving a factual situation very similar to this case, the Department held that it would not ordinarily

recommend that the Attorney General start suit to cancel a patent unless (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under obligation has suffered by issue of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved.

The circumstances of this case, in our judgment, warrant referral by the Solicitor of this Department to the Attorney General with a recommendation to initiate suit seeking cancellation of this patent issued to Helen M. Birch and Fred H. Howe to the extent that said patent includes the 1 1/4 acres which is the subject of this case, for the reasons set forth below.

Because the mining claim had two dwellings on it, both of which were wrongly presumed to belong to the mining claimants, Helen M. Birch and Fred H. Howe, two separate tracts comprising 1 1/4 acres each (one tract for each house) were patented to them. Now we learn that the appellant owned and occupied one of the houses with her children, and that she has since been subjected to a demand by Mrs. Birch for eight years back rent and has been given notice evicting her from what formerly was her own house.

There seems to be an element of fraud or gross error, or both, in the issuance of the patent to include the N 1/2 NW 1/4 SW 1/4 NW 1/4 NE 1/4 in that Mrs. Birch apparently represented to the Bureau of Land Management that the house on that land was occupied by her "guests", the Marsh family. Subsequently her joint applicant, Mr. Howe, advised that the house was occupied by her "renters". No effort was made by the Bureau examiner to determine the nature and tenure of the Marsh occupancy, although he was on the premises and observed "a Mexican or American-Indian family with approximately four children. They are reported to be guests of Mrs. Birch." Although Mrs. Birch did not state directly that she was the owner of the Marsh house, her references to it would impel the conclusion that she was the owner. Since Mrs. Birch was not the owner, she was not eligible to receive a patent to the tract embracing the Marsh home, since the Act requires that a qualified applicant must be the occupant-owner of valuable improvements. 30 U.S.C. § 702 (1970). As to the above described tract she was neither the occupant nor the owner of the improvements.

The appellant is a widow with six children. She and her late husband purchased the home and subsequently obtained a building permit from the county and added two rooms. It has been the family

residence for more than 20 years. During this time they have paid taxes on the dwelling. They have no other residence. Appellant's husband died in 1970. These factors show "significant equitable considerations are involved."

We must also recognize that by the error of patenting the land occupied by her dwelling to someone who had no right thereto, the Department in effect has deprived appellant of her home, and unjustly enriched her neighbor, who seems bent on exploiting her good fortune to the legal limit. The patentees paid only $12.50 for which they got 2 1/2 acres of land, plus the Marshes' house, a rather exceptional bargain, not envisaged by the Act. If the patent were canceled as to the 1 1/4 acre which she occupies, the occupancy by Mrs. Marsh could be regularized, since the neighborhood is already rural-residential and the county has been serving it for the past 20 years, at least.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Land Office is affirmed as modified herein. We recommend to the Solicitor that he consider referral to the Department of Justice the proposal to cancel patent 27-70-0090, to the extent of the conflict. In the event that the patent is so canceled, an application for reinstatement by the appellant will be given careful consideration, and consideration would also be given to regularizing the Marsh occupancy under any applicable public land law.

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Frederick Fishman, Member

We concur:

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Edward W. Stuebing, Member

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Martin Ritvo, Member